No. 91-1731

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

CHESTER STRANCZEK, Mayor of the Village of Crestwood, individually, and ROBERT COOLING, Chief of Police of the VILLAGE OF CRESTWOOD, individually,

Petitioners,

-and-

CHESTER STRANCZEK, Mayor of the Village of Crestwood, in his official capacity, and ROBERT COOLING, Chief of Police of the VILLAGE OF CRESTWOOD, in his official capacity, and VILLAGE OF CRESTWOOD, a municipal corporation,

Defendants,

vs.

MARY SCHULTZ and JOSEPH GOLF,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether immunities (such as absolute legislative immunity) that protect a part-time Village Mayor and the Village's Chief of Police, acting as a sergeant-at-arms, from civil rights suits and personal liability for decisions and actions made and taken during a regular meeting of the village's legislative body are so substantive a part of the principles embodied in Section 1983 of the federal Civil Rights Act, 42 U.S.C. § 1983, and/or so important to substantial societal needs and values that plaintiffs must meet a "heightened pleading" standard requiring that plaintiff's complaint affirmatively allege facts which make a *prima facie* showing that the immunities do not apply under the circumstances, with the failure to so plead call for dismissal for failure to allege those matters necessary to state a claim upon which relief can actually be granted, rather than a prolongation of the lawsuit, for discovery or any other purpose.

2. Whether the Seventh Circuit's rush to judgment against the petitioners on the merits, when all that the Court had before it was the parties' jurisdictional statement and memoranda on jurisdiction, thus denying the petitioners opportunity to file any appellate brief and denying the petitioners an opportunity to be heard in argument on the merits of their absolute legislative immunity defense deprived petitioners of their constitutional due process right to a meaningful appeal.

3. Whether (a) a Mayor who, as presiding officer of a regular, legislative Village Board meeting, had the obligation to maintain order, and (b) a Chief of Police who carried out the Mayor's orders in the manner of a sergeant-at-arms, are entitled to absolute legislative immunity for ejecting two individuals because they interfered with the meeting by attempting to force a particular item onto the agenda and by objecting to the Board's approval of its minutes of a prior meeting, and for later arresting the

plaintiffs for re-entering the board room from which they had just been ejected, while others continued the disruption of the meeting that the plaintiffs have triggered.

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I. The court should hear this matter in order to resolve whether the substantive policies served by civil rights immunities necessitate that the Seventh Circuit follow the approach taken by the vast majority of the other federal appellate circuits and impose upon plaintiffs a heightened pleading standard which requires plaintiffs to plead sufficient facts to overcome, on a *prima facie* basis, a defendant's claim of immunity. 9

II. The Court should summarily, or upon hearing, reverse or vacate and remand to vindicate petitioners' due process rights to a meaningful appeal which were denied when, before the petitioners had an opportunity to file their brief addressing the merits of their absolute legislative immmunity claim, the Seventh Circuit proceeded to rule on the merits, although the only issue before them was the issue of appellate jurisdiction over petitioners' interlocutory appeal from the district court's denial of absolute legislative immunity. 16

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III. The Court should hear this matter to resolve an important question of federal law regarding the scope of absolute legislative immunity — whether acts such as the setting of an agenda and the approval of the legislature's prior minutes are so inherently intertwined with and vital to the deliberative process that acts to protect them from interference are within the scope of a legislator's absolute immunity. 23

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No.

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CHESTER STRANCZEK, Mayor of the Village of Crestwood, individually, and ROBERT COOLING, Chief of Police of the VILLAGE OF CRESTWOOD, individually,

Petitioners,

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CHESTER STRANCZEK, Mayor of the Village of Crestwood, in his official capacity, and ROBERT COOLING, Chief of Police of the VILLAGE OF CRESTWOOD, in his official capacity, and VILLAGE OF CRESTWOOD, a municipal corporation,

Defendants,

v.

MARY SCHULTZ and JOSEPH GOLF,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, Chester Stranczek and Robert Cooling, respectfully pray that a writ of certiorari be issued to review the opinion of the United States Court of Appeals for the Seventh Circuit entered on December 5, 1991 and the order of the United States Court of Appeals for the Seventh Circuit denying their request for rehearing entered on January 27, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals appears as Appendix A. The order of the Court of Appeals denying petitioner's request for rehearing is attached as Appendix C. The District Court's memorandum opinion and order and minute order are attached as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on December 5, 1991. The petitioners filed a timely request for rehearing which was denied on January 27, 1992. This petition for certiorari was filed within 90 days of January 27, 1992. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time

of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fed. Rule App. Pro. 31(a):

The appellant shall serve and file a brief within 40 days after the date on which the record is filed. The appellee shall serve and file a brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a court of appeals is prepared to consider cases on the merits promptly after briefs are filed, and its practice is to do so, it may shorten the periods prescibed above for serving and filing briefs, either by rule for all cases or for classes of cases, or by order for specific cases.

Fed. Rule App. Pro. 34(a):

Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a

statement setting forth the reasons why oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:

> Oral Argument will be allowed unless
>
> (1) the appeal is frivolous; or
>
> (2) the dispositive issue or set of issues has been recently authoritatively decided; or
>
> (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

Court of Appeals for the Seventh Circuit, Rule 34(f):

> DETERMINATION BY COURT NOT TO HEAR ORAL ARGUMENT. If the court, acting *sua sponte* or upon suggestion of an appellee seeking affirmance or an administrative agency seeking enforcement of its order, contemplates deciding an appeal without hearing oral argument, each party will be given an opportunity to file a statement setting forth the reasons why, in its opinion, oral argument should be heard. Any suggestion for affirmance or enforcement without oral argument shall include the reasons the party believes oral argument is unnecessary. Four copies of the suggestion with proof of service shall be filed simultaneously with 15 copies of the main

brief. The suggestion is to include the party's reasons as to why oral argument is not necessary. The suggestion will not be entertained if the appeal is already scheduled for oral argument. Oral argument will be allowed in all cases except those in which a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed for one of the reasons set forth in Rule 34(a) Fed. R. App. P.

Crestwood Village Code, 1-5-1:

CORPORATE AUTHORITIES: The legislative and governing body of the Village shall consist of the Mayor and six Trustees, who shall possess the qualifications for office, be elected by the legal voters of the Village, take the oath of office and perform the duties provided by the State Statutes.

Crestwood Village Code, 1-5-6:

PRESERVATION OF ORDER: The presiding officer shall preserve order and decorum and may speak to points of order in reference to other members, and shall decide all questions of order, subject to an appeal to the Village Board, on which appeal no member shall speak more than once without the unanimous consent of the Board.

While the presiding officer is putting the question, or while business is being transacted, no member shall walk across or out of the Village Board room except by consent of the Board.

Every member, previous to his speaking, making a motion or seconding the same, shall address himself to the presiding officer, and say, "Mr. Mayor", but shall not proceed with his remarks until recognized and named by the Chair.

When two (2) or more members speak at once, the presiding officer shall name the member who is to be first to speak.

In the case of any disturbance or disorderly conduct the presiding officer shall have the power to require the room to be cleared if necessary.

No mechanical voice recording device or television cameras shall be permitted to operate during the Board's meetings unless consent for such operation shall have been given by the Board.

Crestwood Village Code, 1-5-18:

ADDRESSING THE BOARD: No person, other than a member of the Board, shall address the Board without two-thirds (2/3) consent of the members present. However, this restriction shall not apply to responses where reports are requested of, or inquiries directed to, the Village Treasurer, Village Attorney, Village Engineer, or any other Village official or employee.

STATEMENT OF THE CASE

Jurisdiction over plaintiffs' action brought under 42 U.S.C. § 1983 was conferred on the District Court by 28 U.S.C. § 1331

and 28 U.S.C. § 1343.

Petitioner Stranczek is the Mayor of the Village of Crestwood ("Village"). Petitioner Cooling is the Chief of Police of the Village. The plaintiffs, Schultz and Golf, filed an amended complaint against petitioners Stranczek and Cooling, claiming that they violated their first amendment rights.[1] The District Court, pursuant to the liberal federal notice pleading standards, also found that plaintiffs pleaded a violation of their fourth amendment rights. (*See*, District Court's Memorandum Opinion and Order at 5a)

According to the allegations in the plaintiffs' amended complaint, plaintiffs attended an informational meeting on August 23, 1989, regarding a proposal to build a garbage incinerator within the limits of the Village. At that meeting, the Village's service director invited those attending the meeting to voice their concerns regarding incineration at the next Village Board meeting. The plaintiffs attended this Board meeting on August 30, 1989.

At a subsequent September 7, 1989 regularly-scheduled Village Board meeting, the Mayor stated that the issue of the incinerator would not be discussed because it was a dead issue. In response, plaintiff Schultz stood and asked the Mayor why the incinerator issue would not be addressed. The Mayor, who is the presiding

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1. Plaintiffs sued defendants Stranczek and Cooling in both their official and individual capacities. The Village of Crestwood was also named as a defendant. The official capacity claims against the individual defendants and the claim alleged against the Village were contained in Count IV of plaintiffs' amended complaint. This count was dismissed by the District Court because the plaintiffs failed to allege a municipal custom or policy necessary to impose liability against the Village or the individual defendants in their official capacity. Accordingly, only plaintiffs' individual capacity allegations against defendants Stranczek and Cooling remain at this stage. If Stranczek and Cooling are found to be entitled to absolute legislative immunity, this case would be over.

officer of the Board charged with the duty of maintaining decorum, Ill,Rev.Stat. (1989), ch.24, ¶¶3-12-2, 3-12-5, 3-11-6, 3-11-9, Crestwood Village Code, § 1-5-6, ordered Schultz to sit down. Schultz refused.

The Mayor instructed Chief of Police Cooling to remove Schultz from the meeting. Cooling escorted Schultz outside the building and informed her that she was not under arrest and was free to leave. Schultz subsequently re-entered the meeting. At the time Schultz re-entered the meeting, several people were verbally protesting the incinerator. After re-entering, Schultz was arrested by the Chief at the direction of the Mayor and charged with disorderly conduct.

While Schultz was being removed from the meeting for the first time, plaintiff Golf, in response to the Mayor's request to approve the minutes of the prior Village Board meeting, stood up and requested that the prior minutes be corrected. Golf was ejected from the meeting by Cooling, at the direction of the Mayor. Golf was likewise told that he was not under arrest. When Golf re-entered the meeting, he was arrested by Cooling at the direction of the Mayor and was also charged with disorderly conduct.

In response to plaintiffs' amended complaint, petitioners Stranczek and Cooling filed a 12(b)(6) motion to dismiss on the basis that they were entitled to absolute legislative immunity. The District Court denied the petitioners' immunity claim, and the petitioners sought an interlocutory appeal.

After the petitioners filed their jurisdictional statement, the plaintiffs filed an objection to petitioners' jurisdictional statement and sought dismissal of the appeal. The petitioners filed a memorandum in response to plaintiffs' motion to dismiss the appeal.

The Seventh Circuit Court of Appeals, when the only issue before it was the issue of jurisdiction over petitioners' interlocutory appeal, affirmed the District Court's denial of petitioners' claim of absolute immunity. By deciding the merits of petitioners' appeal when the only issue before the Court was jurisdictional, the Seventh Circuit deprived petitioners of their right to file a brief addressing the merits and their right to oral argument pursuant to Federal Rules of Appellate Procedure 31 and 34, and Rule of the Seventh Circuit 34. Petitioners thereafter filed a petition for rehearing, which was denied on January 27, 1992.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD HEAR THIS MATTER IN ORDER TO RESOLVE WHETHER THE SUBSTANTIVE POLICIES SERVED BY CIVIL RIGHTS IMMUNITIES NECESSITATE THAT THE SEVENTH CIRCUIT FOLLOW THE APPROACH TAKEN BY THE VAST MAJORITY OF THE OTHER FEDERAL APPELLATE CIRCUITS AND IMPOSE UPON PLAINTIFFS A HEIGHTENED PLEADING STANDARD WHICH REQUIRES PLAINTIFFS TO PLEAD SUFFICIENT FACTS TO OVERCOME, ON A *PRIMA FACIE* BASIS, A DEFENDANT'S CLAIM OF IMMUNITY.

This case raises a pleading issue intimately related to a ground upon which this Court granted *certiorari* in *Siegert v. Gilley*, ___ U.S. ___, 111 S. Ct. 1789 (1991), but which ultimately went unreached by the Court — whether a "heightened pleading" standard is required of a civil rights plaintiff. *Id.*, 111 S.Ct. at 1796 (Marshall, J. dissenting). The Seventh Circuit did not require a "heightened pleading" standard in the case at bar; rather, it affirmed the District Court's postponement of its decision on the

petitioners' *absolute* immunity defense — legislative immunity — in order to permit discovery to fill the void left by the absence of factual allegations in the amended complaint (hereinafter "complaint"). The Seventh Circuit relied on assumptions to avoid the prompt application of immunity. (1a).[2]

The allegations alleged, and thereby admitted on the motion to dismiss, showed clearly that the circumstances from which the claim arose were legislative. A regular meeting of the Village Board of Trustees, a legislative body, *Coniston v. Village of Hoffman Estates,* 844 F.2d 461, 469 (7th Cir. 1988); *see, also,* Ill.Rev.Stat. (1989), ch. 24, ¶¶3-12-5, 3-11-9; *Crestwood Village Code,* ¶¶1-5-1, was in session during the entire time period involved. The plaintiffs themselves admitted by their allegations that Schultz, without authorization, interrupted and interfered with the Board's proceedings, injecting herself into the proceedings to object to the Board's agenda. The plaintiffs themselves also admitted by their allegations that Golf, without authorization, interrupted and interfered with the Board's proceedings, injecting himself into the proceedings to disagree with the Board's adoption of the record of its proceedings, the minutes of a prior meeting. The Mayor, as presiding member of the Board, charged with the responsibility of conducting an orderly session, Crestwood Village Code, ¶1-5-6, Ill. Rev. Stat. (1989), ch. 24, ¶¶3-12-2, 3-12-5, 3-11-6, 3-11-9, ordered each plaintiff removed from the board room because of their respective behavior. When they re-entered the board room, despite their removal therefrom, the Mayor ordered them arrested. The complaint specifically alleges that at the time that Schultz re-entered the board room, other individuals had continued the disruption that Schultz and Golf had triggered. The Chief of

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2. The approach adopted by the Seventh Circuit in this case runs directly contrary to this Court's holding that "[P]laintiffs may not play dog in the manger . . ." *Butz v. Economou,* 438 U.S. 478, 508 (1978).

Police acting as the functional equivalent of a sergeant-at-arms, executed the Mayor's directions and removed, and after they re-entered, arrested the plaintiffs.

As previously stated, the regular Village Board meeting had convened and was proceeding during all relevant times. Therefore, regardless of whether a *post hoc* review of the Mayor's directions, and the Chief's execution of them, were to conclude that they were correct or incorrect, the Mayor and the Chief were entitled to be absolutely shielded from a *post hoc* review by virtue of the legislative context in which they were performing. Based on the allegations of fact contained in the complaint, a motion to dismiss the suit against the Mayor and the Chief, in their personal capacities, based on absolute legislative immunity, was appropriate and should have been granted. *Cf.*, *Scheuer v. Rhodes*, 416 U.S. 232, 238-39 (1974).

Postponement of a ruling on the legislative immunity defense allows the suit to survive petitioners' motion to dismiss, despite the fact that the complaint lacked a *prima facie* factual demonstration that defeated the absolute legislative immunity that would normally apply to the legislative session. The Seventh Circuit's affirmance of the District Court's denial of the petitioners' motion to dismiss prolonged the suit, rather than resolving it at the earliest stage of litigation.[3] Its decision clearly conflicts with the decisions of other United States Courts of Appeal and with the applicable decisions of this Court.

The decision of the Seventh Circuit directly conflicts with the repeated holdings of this Court that questions of immunity are to be resolved at the earliest stage of the litigation. *Siegert*

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3. Indeed, the best face that can be put on the Seventh Circuit's decision is that it converted an absolute immunity into an issue appropriate only to the lesser qualified immunity.

v. Gilley, ___U.S.___, 111 S. Ct. 1789, 1793 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982). *Cf.*, *Scheuer v. Rhodes*, 416 U.S. 232, 238-39 (1974). Indeed, the postponement of the determination of an absolute immunity until after discovery undermines the important societal values that this Court has stated the immunities are to serve (*e.g.*, preventing officials from being distracted in their duties, preventing officials from being inhibited in the exercise of their discretion, and preventing able people from being deterred from public service), and thwarts the full purpose of the immunity (to shield a defendant from the obligations of litigation, such as discovery and trial, as well as from financial liability). *Siegert v. Gilley*, ___U.S.___, 111 S. Ct. 1789, 1793-1794 (1991); *Anderson v. Creighton*, 483 U.S. 635, 646 (1987); *Mitchell v. Forsyth*, 472 U.S. 511, 525-27 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982).

Virtually every Circuit that has passed on the question of how to simultaneously preserve remedies for official wrongdoing without prolonging the burden to defendants who should succeed on immunity claims, *except the Seventh Circuit*, has decided in favor of a "heightened pleading" standard.[4] The District of Columbia, Second, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits have applied heightened pleading standards, placing on plaintiffs the burden of alleging facts which made a *prima facie* demonstration of the inapplicability of an immunity defense.[5]

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4. The petitioners clearly raised the issue of "heightened pleading" standards and the conflict of the Seventh Circuit's approach with that of at least one other Circuit, the Fifth Circuit, in their petition for rehearing, which followed the Seventh Circuit's precipitous and unexpected decision on the merits (*see*, Reasons for Cert., II).

5. *E.g.*, *D.C. Circuit: Hunter v. District of Columbia*, 943 F.2d 69, 75 (D.C. Cir. 1991); "In order that an official also be spared the burdens of discovery and trial upon the basis of allegations that will not ultimately support

(Cont'd)

The Seventh Circuit's conflict with other Circuits on the

(Cont'd)
a judgment against him (citation ommited), we require that a complaint alleging conduct by a government official performing a discretionary function meet a heightened pleading standard."

Second Circuit: Francis v. Coughlin, 849 F.2d 778, 780 (2nd Cir. 1988): "Unless the plaintif's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal *before the commencement of discovery.*" (Court's emphasis.)

Fourth Circuit: Gooden v. Howard County, Md., 954 F.2d 960, 969-79 (4th Cir. 1992): "To avoid evisceration of the purposes of qualified immunity, courts have thus required that plaintiffs alleging unlawful intent and conspiracy claims under § 1985(3) or § 1983 plead specific facts in a nonconclusory fashion to survive a motion to dismiss".

Fifth Circuit: Elliott v. Perez, 751 F.2d 1472, 1482 (5th Cir. 1985): "Once a complaint against a defendant state legislator, judge, or prosecutor (or similar officer) adequately raises the likely issue of immunity — qualified or absolute — the district court should on its own require of the plaintiff a detailed complaint alleging with particularity all material facts on which he contends he will establish his right to recovery, which will include detailed facts supporting the contention that the plea of immunity cannot be sustained." *See also*, the following Fifth Circuit cases which have imposed upon a plaintiff the burden to plead facts showing that any claim of immunity cannot be sustained: *Nieto v. SanPerlita Indep. Sch. Dist.*, 894 F.2d 174, 178 (5th Cir. 1990); *Brown v. Glossip*, 878 F.2d 871, 874 (5th Cir. 1989); *Geter v. Fortenberry*, 849 F.2d 1550, 1553 (5th Cir. 1988); *Brown v. Texas A&M Univ.*, 804 F.2d 327, 333 (5th Cir. 1986); *Jacques v. R.K. Procunier*, 801 F.2d 789, 792 (5th Cir. 1986).

Sixth Circuit: Nuclear Transp. & Storage, Inc. v. United States, 890 F.2d 1348, 1355 (6th Cir. 1989): "We see no reason why the heightened pleading requirement . . . should not apply to a *Bivens* action brought against a federal official."

Eighth Circuit: Brown v. Frey, 889 F.2d 159, 170 (8th Cir. 1989): "Damage
(Cont'd)

"heightened pleading" requirement appears to be rooted in an even more fundamental conflict with the authority of this Court and the decisions of other circuits. The "heightened pleading" standard adopted by the bulk of other Circuits gives a civil rights defendant's immunity the portance and regard that a substantive defense commands. Although the Fifth Circuit, in *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985), is the only court to have directly stated that the "heightened pleading" requirement is rooted in the fact that a civil rights immunity is a substantive defense[6], the

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(Cont'd)
actions against government officials are subject to a heightened standard of pleading . . . ."

Tenth Circuit: Sawyer v. County of Creek, 908 F.2d 663, 665-66 (10th Cir. 1990): "Following a defendant's motion to dismiss [on the basis of qualified immunity], the district judge should permit the plaintiff to come forward with any additional allegations showing that the defendant violated clearly established law."

Eleventh Circuit: Marx v. Gumbinner, 855 F.2d 783, 792 (11th Cir. 1988): When a court is faced with a claim of immunity, the court "may exercise its inherent power to narrow the issues for trial and require the plaintiff to state with more specificity the factual allegations supporting the claim." *See also, Arnold v. Board of Ed. of Escambia County, Ala.*, 880 F.2d 305, 309 (11th Cir. 1989): "[I]n an effort to eliminate non-meritorious claims on the pleadings and to protect public officials from protracted litigation involving specious claims we, and other courts, have tightened the application of Rule 8 to § 1983 cases").

See also, the following cases: *Krohn v. United States*, 742 F.2d 24, 31-32 (1st Cir. 1984); and *Branch v. Tunnell*, 937 F.2d 1382, 1386 (9th Cir. 1991), showing that the First and Ninth Circuits impose a heightened pleading standard, at least as to *Bivens* actions, and *Rose v. Bartle*, 872 F.2d 331, 353 (3rd Cir. 1989), showing that the Third Circuit applies a heightened pleading requirement to all civil rights actions.

6. The enabling act for the Federal Rules of Civil Procedure states that the Rules are not to change substantive rights. 28 U.S.C. § 2072(b).

"heightened pleading" requirement's connection to the substantive nature of a civil rights immunity defense is discernible in the decisions of other Circuits requiring reasons given for the "heightened pleading" requirement by the other Circuits. The other Circuits' recognition of the substantive nature of a civil rights immunity agrees with this Court's recognition of a civil rights immunity as substantive. *Tower v. Glover*, 467 U.S. 914, 920 (1984) ("On its face § 1983 admits no immunities. But since 1951 this Court has consistently recognized that substantive doctrines of privilege and immunity may limit the relief available in § 1983 litigation"). The Seventh Circuit, in conflict with the holdings of other federal circuits and of this Court, has recently held a civil rights immunity claim to be "distinctly procedural." *Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991).[7] The Seventh Circuit routinely defers the resolution of immunity claims and treats them as it would any other affirmative defense. *Id.*

These conflicts between the Seventh Circuit, and the holdings of most of the other Circuits and of this Court, are of great importance. Literally hundreds of thousands of persons who earn their living in the private sector give up much of their personal time voluntarily to take on great public responsibility for the welfare of ther communities with little or no compensation. Indeed, such "citizen" officials are the lifeblood of units of local government throughout this country. As this Court has already recognized, needless civil rights litigation should not serve as a deterrent to such volunteers. Also, those who have given their lives to public service are likewise deserving of protection from claims that cannot lead to relief. This Court should clearly hold that only when facts foreclosing immunity are alleged (subject

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7. This recent holding by the Seventh Circuit not only runs counter to the holdings in other circuits, but also runs counter to earlier Seventh Circuit precedent, *Coleman v. Frantz*, 754 F.2d 719, 726 (1985), based on this Court's decision in *Tower v. Glover*, 467 U.S. 914, 920 (1984).

to Fed. R. Civ. P. 11 sanctions) should a civil rights suit be permitted to further burden those engaged in public service. Because immunity is a substantive right that cannot be destroyed or delayed by artful omissions in pleading, a uniform national rule is necessary.

The issue is not only an important and pressing one for those serving in government throughout the nation, but also is important to petitioners, who should not suffer burdens and interferences with their personal and public lives as the reward for having chosen public service merely because they unluckily happen to reside and serve within the Seventh Circuit.

II.

THE COURT SHOULD SUMMARILY, OR UPON HEARING, REVERSE OR VACATE AND REMAND TO VINDICATE PETITIONERS' DUE PROCESS RIGHTS TO A MEANINGFUL APPEAL WHICH WERE DENIED WHEN, BEFORE THE PETITIONERS HAD AN OPPORTUNITY TO FILE THEIR BRIEF ADDRESSING THE MERITS OF THEIR ABSOLUTE LEGISLATIVE IMMUNITY CLAIM, THE SEVENTH CIRCUIT PROCEEDED TO RULE ON THE MERITS, ALTHOUGH THE ONLY ISSUE BEFORE THEM WAS THE ISSUE OF APPELLATE JURISDICTION OVER PETITIONERS' INTERLOCUTORY APPEAL FROM THE DISTRICT COURT'S DENIAL OF ABSOLUTE LEGISLATIVE IMMUNITY.

The Seventh Circuit "so far departed from the accepted and usual course of judicial proceedings" that "an exercise of this Court's power of supervision" is necessary to vindicate due process and fairness to the petitioners. Sup. Ct. R. 10.1(a). Certainly, the rights of the Mayor and Chief of Police should not themselves

be lost or sacrificed in this lawsuit purportedly brought for the very purpose of vindicating civil rights.

The petitioners were prejudiced when the Seventh Circuit deprived them of rights provided every appellant by the Federal Rules of Appellate Procedure and the Seventh Circuit Rules. Fed. R. App. P. 28, 31(a); R. of 7th Cir. R. 28, 31. The petitioners were never permitted to participate in their appeal beyond the Court's preliminary request for a statement of the ground upon which appellate jurisdiction rested (a routine, separate preliminary step called a "Statement of Jurisdiction" [7th Cir.R. 3(c)]. When the Seventh Circuit passed upon the "statement of jurisdiction," it did not restrict itself to the issue of jurisdiction therein addressed. Yet, the jurisdictional statement and memorandum in support were no substitute for an appellants' brief. Their scope and purpose were entirely different from the function of an appellant's brief. Petitioners were denied the opportunity to file a brief on the merits, because the Seventh Circuit rushed headlong to a judgment on the merits without guidance from the parties.

Petitioners were never given an opportunity to file an appellant's brief. They were thus deprived of their right to address the Seventh Circuit on the merits, despite the fact that the Appellate Court rules entitled them to present their arguments in full by an appellant's brief.[8] The rights vouchsafed by the Rules were taken from petitioners, in violation of the accepted and usual course of judicial proceedings. They were taken because the Seventh Circuit, referring to the jurisdictional papers filed, stated: "The papers filed to date show, however, that the district court

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8. Indeed, even oral argument (which petitioners were also denied) should not have been taken away under the Rules of the Seventh Circuit without the Court providing an opportunity for each party to file a statement setting forth reasons why oral argument should be heard. 7th Cir.R. 34(f).

did not err so we summarily affirm its decision to prevent the creation of needless delay." (1a).

Short shrift was given to petitioners solely to expedite proceedings. Fairness and justice were sacrificed for speed. But, the Constitution recognizes higher values than judicial speed. In *Stanley v. Illinois*, 405 U.S. 645, 657 (1972), this Court held that:

> the Due Process Clause. . .[was] designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy . . . .

Due process requires that review not be rendered meaningless. *Penson v. Ohio*, 488 U.S. 75, 79-89 (1988); *Evitts v. Lucey*, 469 U.S. 387, 393-400 (1985); *Monger v. Florida*, 405 U.S. 958, 960 (1972); *Entsminger v. Iowa*, 386 U.S. 748, 750-52 (1967); *Anders v. California*, 386 U.S. 738 (1967); *Douglas v. California*, 372 U.S. 353, 354-58 (1963). But, an appeal is rendered a meaningless ritual where the appellants do not have the benefit of a brief. *Penson v. Ohio*, 488 U.S. 75, 84 (1988) ("The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial [court] to [the] appellant stage"); *Swenson v. Bosler*, 386 U.S. 258, 259 (1967) (the assistance of appellate counsel in preparing and submitting an appellate brief which defines the legal principles on which a claim of error is based is essential to a litigant); *Entsminger v. Iowa*, 386 U.S. 748, 752 (1967) (a decision based on a plenary record which deprives an appellant of a full record, briefs and arguments prevents all hope of an adequate and effective appeal).

Fair process is only achieved where counsel is permitted to act as an active advocate in behalf of his client. *Penson v. Ohio*, 488 U.S. 75, 84 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967); *Douglas v. California*, 372 U.S. 353, 357-58 (1963).

Accordingly, due process is not satisfied where the Court reaches its decision based on its own *ex parte* review of the record. *Id.*, at 356. Nor can speculation that counsel would not have made a difference be an adequate substitute for actual appellate advocacy, particularly when the court's speculation is itself unguided by the adversarial process. *Penson v. Ohio*, 488 U.S. 75, 86-7 (1988).

This case cries out for justice. A presumption of prejudice attaches when an appeal is decided before the appellant has had the opportunity to enlighten the court with a brief on the merits. *Penson v. Ohio*, 488 U.S. 75, 88 (1988). But prejudice does not have to be imagined. The record is replete with evidence.

For example, the Seventh Circuit, in its cursory opinion, relied on *Hansen v. Bennett*, 948 F.2d 397 (7th cir. 1991), a case which the Seventh Circuit decided two months prior to the decision in the case at bar. In *Hansen*, the plaintiff alleged a violation of his First Amendment rights when he was ejected from a village board meeting. *Id.*, at 398. The plaintiff in *Hansen* however, was not ejected from the legislative portion of the meeting. Rather, he was ejected from the town meeting portion of the meeting which was open to the general public and at which any citizen was allowed to speak on any issue. *Id.*, at 402.

At the time the plaintiff in *Hansen* began speaking, he had the right to do so, unlike the plaintiffs in the case at bar. Also unlike the case at bar, the meeting in *Hansen* was open to the widest range of topics, and the plaintiff in that case was not speaking about a legislative matter, but about an environmental matter not relating to any pending legislative proposal. *Id.* In short, had the petitioners been permitted their right to file a brief, the Seventh Circuit would have learned that this case and the *Hansen* case represented opposite ends of the spectrum between which rests the line distinguishing between cases of absolute

legislative immunity and those beyond the absolute immunity. (Plaintiffs' complaint in the case at bar admits by allegation that the plaintiffs interfered with the legislative body's attempt to approve its record of a prior meeting and interfered with the setting of its own agenda, actions which are inherent in the legislative process and necessary to enable a legislative body to conduct its affairs.

Furthermore, without the benefit of briefing, the Seventh Circuit overlooked an important aspect of this appeal is the fact that the Seventh Circuit honed in on plaintiffs' Fourth Amendment claims and overlooked the fact that plaintiffs were also found to have pled a First Amendment claim. The Seventh Circuit decision recognizes, if it does not outright accept, the fact that plaintiffs have no valid basis to address the petitioners' Village Board meeting without the consent of two-thirds of the Board members (1a). By focusing on plaintiffs' Fourth Amendment claim, the Seventh Circuit accepted the fact that plaintiffs were properly ejected from the Board meeting in the first instance, as well as the fact that they had no First Amendment right to interfere with this Board meeting. Had the petitioners been accorded the opportunity to file a brief, this issue could have been crystallized and brought to the Court's attention so that it would not have been neglected.

A further example of how, without the benefit of briefing, the Seventh Circuit overlooked an important aspect of this appeal is the Court's assumption that both Schultz and Golf were silent when they re-entered the chambers. The complaint is silent as to Golf. Also petitioners' claim of legislative immunity could have been demonstrated by an appellant's brief to be supported by law, based on the plaintiffs' admitted interference with the Board's approval of the minutes and the setting of its agenda during a regular meeting. *Cf.*, *Schultz v. Sundberg*, 759 F.2d 714, 717 (9th Cir. 1985) (a presiding legislative officer who acted to preserve

the legislative process by compelling boycotting legislators to attend the legislative sessions were immune from suit).

The Seventh Circuit's deprivation of petitioners' right to file a brief flies in the face of a long line of this Court's precedent holding that an appeal can only be meaningful when the aggrieved litigant has the benefit of the forceful advocacy of a full brief addressing the meets and bounds of his claim. "The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial [court] to [the] appellate stage." *Penson v. Ohio*, 488 U.S. 75, 84 (1988). A full brief addressing the merits is the only means to ensure rights are not foregone and legal arguments are not inadvertently passed over. Without the benefit of a brief, an appeal is a meaningless ritual. *Id.*; *see also Swenson v. Bosler*, 386 U.S. 258, 259 (1967). (The assistance of appellate counsel preparing and submitting a brief to the Appellate Court which defines the legal principles on which a claim of error is based is essential to a litigant); *Entsminger v. Iowa*, 386 U.S. 748, 752 (1967) (a decision based on a plenary record which deprives an applicant of a full record, briefs and arguments prevent all hope of an adequate and effective appeal).

Rules, such as the Federal Rules of Appellate Procedure and the Seventh Circuit rules, have been recognized to be the working arm of due process, which establishes the ground rules for adjudication. The due process clause gives all Americans, whoever they are and wherever they happen to be, the right to be judged by valid, pre-existing laws within a framework of established procedures. *Duncan v. Louisiana*, 391 U.S. 145, 169 (1968). As this Court so perceptively and eloquently stated in *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971):

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules

> defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society.

The Seventh Circuit, by depriving petitioners of their opportunity to file a brief on the merits, has rendered meaningless their right to appeal. Because legislative immunity is absolute and protects a public official from suit, discovery and trial, *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985), the failure to provide petitioners an opportunity to present the merits of their immunity claim at the appellate level effectively forces them to lose the very immunity to which they are entitled.

Due process prevents denying the litigants the benefits of established adjudicatory procedures when the denial of such procedures would be the equivalent of denying a litigant an opportunity to be heard on the merits. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 (1982). An appeal, which is no better than the absence of an appeal, cannot be constitutionally adequate. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). It is crucial that this Court hear this case and vindicate petitioners' due process rights, or, in the alternative, exercise its supervisory juridiction and order that petitioners be given a full opportunity to present the merits of their claim through briefing and oral argument before the Appellate Court.

III.

THE COURT SHOULD HEAR THIS MATTER TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW REGARDING THE SCOPE OF ABSOLUTE LEGISLATIVE IMMUNITY — WHETHER ACTS SUCH AS THE SETTING OF AN AGENDA AND THE APPROVAL OF THE LEGISLATURE'S PRIOR MINUTES ARE SO INHERENTLY INTERTWINED WITH AND VITAL TO THE DELIBERATIVE PROCESS THAT ACTS TO PROTECT THEM FROM INTERFERENCE ARE WITHIN THE SCOPE OF A LEGISLATOR'S ABSOLUTE IMMUNITY.

The questions at issue in this appeal are solely ones of law; *i.e.*, whether the approval of minutes and the setting of a meeting agenda for a regular meeting of a Village Board of Trustees is legislative; whether a presiding officer of a legislative body charged with the duty of maintaining decorum during the meeting of the body is acting in a legislative capacity; whether a police chief, acting at the direction of the presiding officer of a legislative body is entitled to the same legislative immunity enjoyed by the presiding officer.

The actions that the Mayor took in setting the Board's minutes and the setting of the Board's agenda and in calling for approval of the Board's prior minutes were inherently legislative. The approval of the Board's agenda are legislative implements necessary to preserve the legislative process. The acts which the Mayor, as the presiding officer of the legislative body, took to preserve the integrity of these legislative implements and to protect them from interference were taken by him within his legislative capacity, and were necessary to further the legislative process.

Absolute legislative immunity should protect not only legislative members, such as the Mayor, but also the Chief of

Police, who was executing the legislative will and performing the function of a sergeant-at-arms within the meeting chamber when he arrested the plaintiffs. *Kilbourn v. Thompson,* 103 U.S. 168, 196-205 (1880); *Anderson v. Dunn,* 19 U.S. (6 Wheat) 204 (1821). *Accord: Eastland v. United States Servicemens Fund,* 421 U.S. 491, 504-08 (1975); *Aitchison v. Raffiani,* 708 F.2d 96, 99-100 (3rd Cir. 1983); *Reed v. Village of Shorewood,* 704 F.2d 943, 952 (7th Cir. 1983); *Traweek v. City and County of San Francisco,* 659 F. Supp. 1012, 1030 (N.D. Calif. 1986), *modified on other grounds,* 920 F.2d 589 (9th Cir. 1990).

Plaintiffs' re-entry after being ejected was in direct contempt of the legislative body, just as the failure to respond to a subpoena would have been. *Kilbourn v. Thompson,* 103 U.S. 168, 196-205 (1880); *Anderson v. Dunn,* 19 U.S. (6 Wheat) 204 (1821).

A legislative meeting would become a comical sideshow if a legislature had to stand by powerlessly while a recalcitrant spectator continued to re-enter after each successive ejection, *ad infinitum.* A legislature's power to protect its processes would be of little value if a legislature were not free to enforce its will.

Furthermore, the Seventh Circuit's affirmance of the District Court approves, indeed adopts, an unrealistic and impractical approach to legislative proceedings, treating them as if they could be divided into discrete, moment-by-moment microscopic sections which can then be analyazed to determine whether the act or word of each moment were legislative or non-legislative. Such an approach would embroil the courts in a greater morass and render immunities more impractical than the subjective test that was repudiated by this Court in *Harlow v. Fitzgerald,* 457 U.S. 800, 815-19 (1982).

The Seventh Circuit misapplied the scope of petitioners' legislative immunity protection. Plaintiffs' silence upon re-entry

is irrelevant to the application of legislative immunity because the principles behind the societal value of legislative immunity give the Mayor the prerogative to make these judgments without fear of being second guessed.[9]

The scope of protection afforded by legislative immunity from civil rights suits is an important federal question which this Court needs to resolve. Citizens serving in local legislatures need to know whether items such as the setting of an agenda or the approval of minutes are legislative in character, and whether action taken to preserve their integrity and protect them from interference is legislative. This Court needs to hear this case so as not to let fear of litigation caused by nagging questions as to the scope of legislative immunity scare legislators from the free exercise of their discretion or potential legislators from public service.

CONCLUSION

The decision below did not correctly follow the decisions of this Court, nor did it comport with the law established and practiced in the majority of other federal Courts of Appeals. The decisions of both the District Court and the Seventh Circuit should be reversed with directions to dismiss the complaint based on absolute legislative immunity.

At the very minimum, the Mayor and the Chief of Police should be accorded the same procedural rights provided by the

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9. According to plaintiffs' complaint, while Schultz was being ejected, Golf arose to interfere with the approval of the minutes. When Schultz re-entered the meeting, several people were verbally protesting. Under these circumstances, it was certainly reasonable for the Mayor to have viewed even Schultz' silent presence in the chamber as stirring or promoting either continued or renewed intereference, or otherwise increasing the risk of future interference.

established rules of court that are routinely accorded all other persons, including *pro se* prisoners. Our Nation seeks to be the exemplar of due process in the world. Expedience should not be permitted to prevail at the expense of fairness and of a just result, which can only proceed from a fully-informed court. The judgment of the Seventh Circuit, if not reversed on the merits after a hearing before this Court, should be reversed or vacated, either summarily or after full hearing, and remanded by this Court for a full, *de novo* consideration and hearing on the merits before a different panel of the Seventh Circuit.

Respectfully submitted,

DAVID LINCOLN ADER
Counsel of Record
JOHN F. DONAHUE
ANCEL, GLINK, DIAMOND,
COPE & BUSH, P.C.,
Attorneys for Petitioners

APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED DECEMBER 5, 1991

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 5, 1991

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge*

MARY SCHULTZ and JOSEPH GOLF,

Plaintiffs-Appellees,

No. 91-3395 v.

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* RIPPLE, *Circuit Judge*, concurring. I agree that the motion to dismiss ought to be denied and, on these facts, also concur in the summary affirmance of the judgment of the district court. The district court held that, in its present procedural posture, the availability of the absolute immunity defense cannot be determined. I agree. *See Rateree v. Rockett*, 852 F.2d 946, 950 (7th Cir. 1988) (adopting a functional approach to legislative immunity at the local level); *cf. Wrigley v. Greanias*, 842 F.2d 955 (7th Cir. 1988) (genuine issue of material fact with respect to functions of public employee can preclude judgment on grounds of qualified immunity).

I do not believe that it is appropriate, on this record, to determine, especially without the benefit of briefing and oral argument, the precise contours of legislative immunity.

Appendix A

CHESTER STRANCZEK, Mayor of the Village of Crestwood, individually and in his official capacity, and ROBERT COOLING, Chief of Police of the Village of Crestwood, individually and in his official capacity,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 90 C 5175
Ann Claire Williams,
Judge.

This matter comes before the court for its consideration of the following documents:

1. "MOTION TO DISMISS APPEAL AND OBJECTION TO JURISDICTIONAL STATEMENT" filed herein on 10/31/91, by counsel for the plaintiffs.

2. "DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO DISMISS APPEAL AND OBJECTION TO JURISDICTIONAL STATEMENT" filed herein on 11/12/91, by counsel for the defendants.

Defendants in the case, the Mayor and Chief of Police of Crestwood, Illinois, took an interlocutory appeal, asserting that their acts are protected by legislative immunity. See *Helstoski v. Meanor,* 442 U.S. 500 (1979). Plaintiffs have moved to dismiss the appeal for want of jurisdiction.

Helstoski holds that decisions rejecting claims of absolute

legislative immunity may be appealed before trial. The district court rejected such a claim, not conclusively, to be sure, because the court intimated that the claim could be renewed after discovery. But one of the functions of absolute immunity is protecting the claimant from discovery, making the district court's order appealable.

The papers filed to date show, however, that the district court did not err, so we summarily affirm its decision to prevent the creation of needless delay. According to the complaint, the allegations of which we must accept as true, the Mayor ordered the Chief of Police to eject two citizens of the Village who spoke at a meeting of the Village Board without the assent of two-thirds of the members of the Board. When the plaintiffs reentered the meeting, they were arrested. Legislative immunity covers the making of statutes and related rules, not the execution of rules (as by making arrests). See *Hansen v. Bennett*, No. 90-3727 (7th Cir. November 27, 1991), slip op. 6-14. Arrests are not an ordinary part of the legislative power. There may be cases in which imprisonment serves in aid of legislation, cf. *Kilbourn v. Thompson*, 103 U.S. 168 (1880) (arrest for contempt of Congress), but arrests also serve in aid of prosecution without acquiring the absolute immunity that pertains to the prosecution itself. See *Burns v. Reed*, 111 S. Ct. 1934 (1991); *Millspaugh v. Wabash County Department of Public Welfare*, 937 F.2d 1172 (7th Cir. 1991).

Given the posture of the case, in which we must assume that the arrests of persons who kept their silence after reentering the room did not promote legislative deliberations, the district court did not err in rejecting the claim of absolute immunity. We reached a similar conclusion in Hansen. Although that local legislature had opened a "town meeting" by the time of the expulsion, which was an insuperable obstacle to the claim of absolute legislative

immunity, here the problem is the need to assume that the plaintiffs did not interfere with the legislative process in any way after their reentry.

APPENDIX B — MINUTE ORDER AND MEMORANDUM OPINION AND ORDER DATED OCTOBER 1, 1991

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
CLERK

Office of the Clerk

David Lincoln Ader
Ancel, Glink, Diamond & Cope
140 South Dearborn Street
6th Floor
Chicago, IL 60603

Case Number: 1:90-cv-05175

Title: Schultz v. Stranczek

Assigned Judge: Honorable Ann C. Williams

MINUTE ORDER of 10/1/91 by Hon. Ann C. Williams : granting in part and denying in part motion to dismiss the first amended complaint for failure state a claim upon which relief can be granted [22-1] granting in part and denying in part motion to dismiss the first amended complaint for failure to state a claim upon which relief can be granted [26-1] Pretrial conference set for 10/18/91 at 4:00 pm
Mailed notice

This order was entered on the docket by the Clerk October 2, 1991

Appendix B -

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure. It was generated by the automated docketing system being introduced to handle the civil dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DISTRICT

Case No. 90 C 5175

MARY SCHULTZ and JOSEPH GOLF,

Plaintiffs,

v.

CHESTER STRANCZEK, Mayor of the Village of Crestwood, individually and in his official capacity, and ROBERT COOLING, Chief of Police of the Village of Crestwood, individually and in his official capacity, and VILLAGE OF CRESTWOOD, municipal corporation,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiffs Mary Schultz and Joseph Golf brought this action against defendants Chester Stranczek, Mayor of the Village of Crestwood, Robert Cooling, Chief of Police of the Village of Crestwood, and the Village of Crestwood, claiming that the defendants subjected them to false arrest, false imprisonment, unlawful restraint, and malicious prosecution. The plaintiffs also allege that these unlawful actions violated their constitutional rights under 42 U.S.C. § 1983. Pursuant to Federal Rule of Civil Procedure 12(b)(6), the defendants, asserting that the plaintiffs have failed to state a claim for which relief can be granted, and defendants Stranczek and Cooling had absolute immunity for their

alleged actions, have brought this motion to dismiss the plaintiff's First Amended Complaint. For the reasons stated below, the defendant's motion is denied in part and granted in part.

Background

According to the allegations in the plaintiff's complaint, the plaintiffs attended an informational meeting on August 23, 1989 regarding a proposal to build a garbage incinerator within the limits of the Village of Crestwood (Village). At that meeting, the Village's service director invited those attending the meeting to voice their concerns regarding incineration at the next Village board meeting. The plaintiffs attended this board meeting on August 30, 1989.

At a subsequent board meeting, on September 7, 1989, the Mayor of the Village stated that the issue of the incinerator would not be discussed because it was a dead issue. In response to this remark, plaintiff Schultz, who attended the meeting as a member of the public, asked the Mayor why the incinerator issue would not be addressed. Schultz then refused the Mayor's order to sit down, telling him that the community needed to talk about the incinerator which would be built four blocks from her home.

The Mayor instructed Chief of Police Cooling to remove Schultz from the meeting. Cooling escorted Schultz outside the building and informed her that she was not under arrest and was free to leave. Schultz subsequently reentered the meeting. Although she remained quiet, other members of the community attending the meeting had begun verbally protesting the incinerator. The Mayor instructed Cooling to arrest Schultz.

In or about the time that the Mayor requested approval of

the minutes from the last meeting, and during the time Schultz was being removed from the meeting for the first time, plaintiff Golf stood up and requested that the minutes from the previous board meeting be corrected. Golf contended that the discussion of the incinerator issue had been omitted from the previously approved minutes.

The Mayor immediately instructed Cooling to remove Golf from the meeting. Like Schultz, Golf was not immediately placed under arrest. However, when he reentered the meeting, Cooling arrested him pursuant to the Mayor's instruction. Although the complaint does not allege the circumstances surrounding the arrests, the complaint does aver that two other individuals were arrested at the instruction of the Mayor.

The plaintiffs allege that they were placed under arrest and transported to the Village's Police Department where they were charged with disorderly conduct in violation of the Municipal Code of Crestwood, ch. 8, §§ 1-18. Both plaintiffs were released on their own recognizance. On July 11, 1990, the plaintiffs were found not guilty of this charge.

Following this determination, the plaintiffs filed this lawsuit against the defendants alleging that they had been subject to false arrest, false imprisonment, unlawful restraint, and malicious prosecution because they were arrested without probable cause and prosecuted without legal authority. The plaintiffs further allege that the defendants violated their rights under 42 U.S.C. §1983 because the defendants deprived them of their First, Fourth, and Fourteenth Amendment rights.

Appendix B

The Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) permits a defendant to attack an action based upon the sufficiency of the pleadings, rather than upon the merits of the claim alleged. Fed. R. Civ. P. 12(b)(6). The Supreme Court has stated:

> ". . . [it is] the accepted rule that the complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson* 355 U.S. 41, 45-46 (1957).

Following this mandate, this Court must undertake the very limited task of determining whether the claimants are entitled to continue the litigation and offer further evidence in support of their claims. This determination has no bearing on the question of whether the claimants ultimately will prevail. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1973).

In this case, the plaintiffs properly contend that the defendants have gone well beyond attacking the complaint based upon the sufficiency of the pleadings.[1] The defendants claim that their

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1. The excessive detail of the defendants' arguments suggest the defendants' recognition that the issues raised in this motion to dismiss more appropriately should be addressed in a motion for summary judgment. This Court could treat the motion before it as a motion for summary judgment. *See* Federal Rule of Civil Procedure 12(c), but it declines to do so. While the defendants have presented some matters outside the pleadings, the defendants have not placed all relevant matters before the Court and the plaintiffs have not been given the requisite opportunity to present all materials and arguments made pertinent to a summary judgment motion by Federal Rule of Civil Procedure 56.

arguments are not excessive because based upon the facts alleged in the plaintiffs' complaint, their arguments show that proof of those facts would not authorize the grant of relief requested. *See Neitzke v. Williams*, 490 U.S. 319 (1989). While this assertion technically is a correct reading of the case law, it nevertheless fails to recognize that motions to dismiss only should be granted for obviously unreasonable claims. As already noted, the Supreme Court explicitly has stated that it must be clear beyond a doubt that the plaintiff could not prove his case before a court should grant a motion to dismiss. *See Conley*, 355 U.S. at 45-46.

The defendants have gone to great lengths to demonstrate that the facts alleged in the complaint do not support the plaintiffs' claims under what the defendants consider the applicable laws in this case.[2] Contrary to the defendants' contention, this Court finds that the plaintiffs' allegations in their complaint, other than their allegations in Count IV, are not so insufficient that their case should be dismissed. For the sake of clarity, the defendants' arguments for dismissal of the case will be considered separately.

I. Count III

In Count III of the complaint, the plaintiffs allege that the defendants violated 42 U.S.C. § 1983 because they infringed upon the plaintiffs' First Amendment rights to freedom of speech and assembly, and Fourth Amendment rights to be free from unlawful restraint. The defendants contend that no violation of the

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2. Indeed, the defendants' memorandum in support of their motion to dismiss is so long that it violates the requirements established in Local Rule 9(D). That rule states that no brief in support or opposition of a motion shall exceed 15 pages unless the party gets prior approval of the court. No such approval was sought or granted in this instance.

plaintiffs' First Amendment rights occurred because the plaintiffs did not have a First Amendment right in this instance.

The defendants properly assert that the First Amendment does not grant an unlimited and absolute right to free speech and assembly. *Cox v. Louisiana*, 379 U.S. 536, 554 (1965). They further contend that individuals have no fundamental constitutional right to be heard by a governmental body deciding matters of policy. *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915). Thus, the plaintiffs' First Amendment rights were limited in this case because the Village board constituted a public body attempting to discharge the functions of government. Defendants contend therefore that no § 1983 violation could have occurred in this case because the plaintiff's had no Constitutional right which could have been violated.

Construing the allegations in the complaint liberally, as required under Federal Rule of Civil Procedure 12(b)(6), this court is not convinced that the plaintiffs' complaint does not properly demonstrate a First Amendment right to speech and assembly in this case. The full resolution of this issue, however, would require a much more substantial investigation of the case than is required to be alleged in the plaintiffs' complaint.

The defendants contend, for example, that the plaintiffs had no First Amendment here because the Village has an ordinance prohibiting members of the public from addressing the Village board at board meetings. *See* Defendant's Reply to Plaintiff's Response to Defendants' Motion to Dismiss. Determining the applicability and the intent of this ordinance would require this court to consider material outside the scope of the pleadings, the only basis appropriately considered in a motion to dismiss. Furthermore, the plaintiff's assert that another section of the

ordinance entitles the public to address the board at meetings. Certainly the presentation of evidence in support of such contentions would better prepare the court to determine the disputed question of whether the plaintiff's had a First Amendment right in this case.

Furthermore, even if it were appropriate for this Court to consider the Village ordinance cited by the defendants, several other significant issues must be resolved before the Court can determine whether the plaintiffs have stated a valid First Amendment and §1983 claim. Not only would the Court need to consider the circumstances surrounding the board meeting in this case but it also would have to consider the circumstances and practices regularly undertaken at prior board meetings. Therefore, because several pertinent questions should not be answered by the complaint alone in this case, this court finds that the determination of whether the plaintiff's had a First Amendment right, which was violated by the defendants, is better left for further elaboration of the evidence by the parties.

The defendants also contend that the plaintiffs' §1983 claim is not meritorious because Count III of the complaint does not assert a violation of the plaintiffs' Fourth Amendment rights. The plaintiffs counter that they do assert such a violation because Count III incorporates earlier paragraphs in the complaint which allege violations of their Fourth Amendment rights. Because the complaint must be construed liberally and in the light most favorable to the plaintiffs, *Scheuer*, 416 U.S. at 236, the Court finds that the plaintiffs do assert a violation of their Fourth Amendment rights. Paragraphs 33-35 of the complaint clearly allege the unlawful "seizure" or restraint, and arrest of the plaintiffs.

Appendix B

The defendants still argue that even if the complaint properly alleges a Fourth Amendment violation, reliance upon this amendment in support of a § 1983 claim is misplaced. The defendants assert that a violation of one's Fourth Amendment rights only can be found if the seizure at issue was "unreasonable." The seizures in this case were not unreasonable according to the defendants because legislative bodies, such as the Village Board, have the inherent power to punish individuals who obstruct the legislative function. *See Jurney v. MacCracken*, 294 U.S. 125, 143-52 (1935).

For a motion to dismiss, the complaint only needs to demonstrate that the plaintiffs could have a valid claim for relief. *Conley*, 355 U.S. at 45-46. The allegations in this complaint certainly suffice to show that the plaintiff's could have a valid §1983 claim. The Court agrees with the plaintiffs' contention that whether the board constituted a legislative body and whether it was acting in a legislative capacity, however, are questions that require the presentation of further evidence before they can be resolved. The facts in this case, as alleged in the complaint, are not developed enough at this stage for the Court to decide these issues. If this Court found that the Board was not a legislative body or that it was not acting in a legislative capacity, the plaintiffs Fourth Amendment rights might very well have been violated. Thus, contrary to the defendants' contentions, the plaintiffs' § 1983 claim is not so clearly impossible as to warrant a dismissal at this juncture.

II. Count IV

On the other hand, the defendants have properly challenged the plaintiffs' claim in Count IV. Count IV constitutes a § 1983 predicted upon municipal liability, rather than upon personal

liability as in Count III. The defendants first assert that their motion to dismiss should be granted on this claim because, as with Count III, no constitutional violation occurred which would warrant imposing liability on the Village of Crestwood. Because the Court already has determined that while the plaintiffs' allegations of constitutional violations are sufficiently pled, they are not ripe for determination based upon the pleadings alone, the defendants' identical argument against Count IV similarly cannot be addressed at this juncture.

The defendants also contend that the plaintiffs have not alleged sufficient facts to show a Village custom or established practice of engaging in the conduct complained of in this action. More specifically, the defendants argue that the plaintiffs have not demonstrated that the Mayor and the Chief of Police arrested individuals for attempting to speak at Village board meetings on more than this one occasion. The plaintiffs counter that they need not show other occasions where Village officials arrested individuals for speaking at public meetings because demonstrating "other occurrences" is not the only criteria employed to establish a cognizable § 1983 claim for municipal liability. *See Pembauer v. City of Cincinnati,* 475 U.S. 469 (1986).

While the plaintiffs are correct in their assertion that other similar examples of similar conduct are not always required to prove municipal liability under § 1983, this Court has explicitly established that plaintiffs must make sufficient factual allegations to support their claim of a municipal policy. *Sheldon v. City of Chicago,* 1988 U.S. Dist. Lexis 5952 (N.D. Ill. June 16, 1988); *See also Strauss v. City of Chicago,* 760 F.2d 765 (7th Cir. 1985). Mere conclusory allegations of a municipal policy will not suffice. *Id.*

Appendix B

In *Sheldon*, the plaintiff alleged that the defendant city officials unlawfully arrested her and used excessive force in violation of her First, Fourth, and Fourteenth Amendment rights. *Id.* The plaintiff also alleged municipal liability because she claimed that the city had a policy of punishing persons who refused to obey police officers' orders. *Id.* The Court dismissed the plaintiff's complaint, however, because it determined that she had not made more than conclusory allegations indicating that misconduct occurred at any other time than on this occasion. *Id.*

Like the plaintiff in *Sheldon*, the plaintiffs in this case have failed to meet the burden of alleging sufficient facts in support of their claim. In fact, the plaintiffs' allegations in this case are very similar to the conclusory allegations in *Sheldon*. The plaintiffs' complaint alleges no facts suggesting that the Mayor and the Chief of Police arrested protestors on other occasions when the incinerator issue was discussed or other hotly debated issues were discussed.

Moreover, the plaintiffs' allegations that two other people were arrested at the Village Board Meeting does not constitute evidence of a municipal policy as required under *Sheldon*. The other individuals were arrested on the same evening and for the same activity. One easily could construe these arrests as part of the same event at issue in this case. Thus, the plaintiffs have failed to adequately allege the municipal policy required to establish liability under § 1983. For this reason, the Court grants the defendants motion to dismiss on this Count.

III. Counts I and II

As with Count III, the plaintiffs have alleged sufficient facts in Counts I and II to withstand a motion to dismiss their claims

of false arrest, malicious prosecution, and false imprisonment. The defendants contend that such claims are not possible because the Mayor and the Chief of Police had probable cause to arrest the plaintiffs. Claiming that the plaintiffs violated a Village ordinance against addressing the board at a board meeting, the defendants assert that they had sufficient reason to arrest the plaintiffs regardless of whether the plaintiffs ultimately were convicted of the charges brought against them.

While the facts alleged suffice to state a claim, the determination of whether the Village officials' conduct was reasonable would require a much more comprehensive inquiry than the defendants suggest. Consideration of the ordinance cited by the defendants would require this Court to look beyond the pleadings in this case. Furthermore, as already noted, the terms of the ordinance have been disputed by the plaintiffs; they contend that they were entitled to address the Village Board at the meeting. This dispute must be resolved before the validity of the plaintiffs' claims can be assessed.

Finally, the defendants' reliance on cases such as *Banish v. Locks*, 414 F.2d 638 (7th Cir. 1969), is misplaced. The defendants cite this case in support of their argument that if the defendants had probable cause to arrest the plaintiffs, the arrests and prosecutions were not lawful. *Id.* at 641. However, the court's opinion in *Banish* was based upon the defendant's motion for summary judgment rather than a motion to dismiss as in this case. As their reliance upon *Banish* indicates, the defendants base their arguments on issues not properly resolved at the pleading stage of this case. The plaintiffs must only demonstrate that they have a potentially valid claim against the defendants at this point. The plaintiffs have met this burden. The Court will only consider the validity of Counts I and II following further development of the

evidence in this case.

VI. The Absolute Immunity Defense

Finally, the defendants contend that even if their motion to dismiss should not be granted based upon the insufficiency of the pleadings, it should be granted because the defendants are entitled to absolute legislative immunity. The defendants assert that "legislators" have absolute immunity from personal liability under § 1983 of the Civil Rights Act. *Tenny v. Brandhove,* 341 U.S. 367 (1951). Such absolute immunity is only available, however, when legislators are acting "in a legislative capacity." *Rateree v. Rockett,* 630 F. Supp. 763, 769 (N.D. Ill. 1986).

The plaintiffs again correctly assert that the defendants have improperly based their arguments upon a number of factual assumptions which the plaintiff contest. As the Supreme Court stated in *Scheuer,* the availability of the absolute immunity defense generally cannot be determined based solely upon the pleadings in this case. 416 U.S. at 249. The Court suggested that the absence of a factual record made a determination whether to dismiss the case inappropriate, as did the lower court's acceptance as a fact the good faith of the defendant in that case. *Id.*

The defendants in the case at bar cannot just assume that they qualify as legislators and that they were acting in a legislative capacity as the absolute immunity defense requires. Like in *Scheuer,* the parties have not had the opportunity to establish a factual record in this case; thus, the question of whether the defendants were legislators acting in a legislative capacity cannot be resolved at this juncture. The Court is unpersuaded by the defendants' suggestion that holding a board meeting necessarily answers these questions. *See Hansen v. Bennett,* 1990 U. S. Dist.

LEXIS 14332 (N.D. Ill. Oct. 22, 1990). Thus, without further development of the facts in this case, the Court must deny the defendants' motion to dismiss based upon their argument of absolute legislative immunity.

CONCLUSION

For the reasons stated above, the defendants' motion to dismiss is granted in part and denied in part.

ENTER

s/ Ann Claire Williams
ANN CLAIRE WILLIAMS,
JUDGE
United States District Court

Dated: October 1, 1991

APPENDIX C — ORDER OF THE SEVENTH CIRCUIT COURT OF APPEALS DENYING PETITION FOR REHEARING DATED JANUARY 27, 1992

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 27, 1992

Hon. WILLIAM J. BAUER, Chief Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge

MARY SCHULTZ and JOSEPH GOLF,

Plaintiffs-Appellees,

No. 91-3395 v.

CHESTER STRANCZEK, Mayor of the Village of Crestwood, individually and in his official capacity, and ROBERT COOLING, Chief of Police of the Village of Crestwood, individually and in his official capacity,

Defendants-Appellants,

and

VILLAGE OF CRESTWOOD, a municipal corporation,

Defendant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Appendix C

No. 90 C 5175
Ann Claire Williams, *Judge*

ORDER

On consideration of the petition for rehearing filed on December 19, 1991, by defendants-appellants, the judges on the original panel have voted to deny rehearing. Accordingly, it is ordered that the aforesaid petition for rehearing is DENIED.